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[HIGH COURT OF AUSTRALIA.]

IN RE UNIVERSAL DISTRIBUTING COMPANY LIMITED
(IN LIQUIDATION).

Company—Compulsory liquidation—Priority of debenture debt to costs, charges and expenses of liquidation and to liquidator's remuneration—Costs of providing liquidator's security, whether allowable—Companies Ordinance 1931 (F.C.T.) (No. 25 of 1931)—Companies Act 1899 (N.S.W.) (No. 40 of 1899).

The assets of a company in compulsory liquidation were insufficient to satisfy the liability secured by its debentures which charged its whole undertaking and its uncalled capital.

Held, that the debenture debt took priority over the general costs, charges and expenses of the liquidation, but the expenses incurred by the liquidator in the actual realization of the assets subject to the security should be thrown upon the proceeds.

Part of the time and services of the official liquidator in respect of which his remuneration was fixed having been expended in getting in both uncalled capital and other moneys out of which the debenture-holder was so entitled to priority of payment :

Held, that so much of the liquidator's remuneration as represented these services together with the expenses properly incurred in the care, preservation and realization of the property should be paid out of the assets in priority to the debenture debt, but that the rest of the expenses of the liquidation and of the remuneration should rank for payment after the debenture debt.

The *Companies Ordinance* 1931 of the Federal Capital Territory adopts with modifications the company legislation of New South Wales in force at its commencement, and sec. 19 (4) of the Ordinance provides that the practice and procedure so far as it is not regulated by rules of the High Court shall be "as nearly as may be according to the practice and procedure of the Supreme Court of the State of New South Wales under the rules made in pursuance of the *Companies Act* 1899 of that State."

Held, that this enactment referred to rules existing at the time and did not refer to rules which might be made from time to time after the commencement of the Ordinance. R. 15 (4) of the *Companies Act Rules* 1932 of New South

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Wales by which the allowance out of the assets of the liquidator's costs of obtaining security from a guarantee company is expressly prohibited is, therefore, not in force in the Federal Capital Territory.

Held, nevertheless, that as the official liquidator was remunerated and undertook the office as part of his professional work, the expense of finding the security which is a condition of his appointment must be borne by him.

Principles on which an official liquidator's remuneration is fixed considered.

REFERENCE to the High Court by the District Registrar at Canberra.

This was a reference to the High Court by the District Registrar at Canberra in the winding up of the Universal Distributing Co. Ltd. (In Liquidation). The facts sufficiently appear in the judgment hereunder.

Codd, for the official liquidator.

Davies, for the debenture-holder.

Cur. adv. vult.

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DIXON J. delivered the following written judgment:—

This Company was incorporated under the laws of the State of New South Wales, but, when the *Companies Ordinance* 1931 commenced, its registered office was situated at Canberra. Sec. 16 of that Ordinance brings under the operation of its provisions any company the registered office of which was on the date of the commencement of the Ordinance situated in the Federal Capital Territory. In the exercise of this Court's original jurisdiction in relation to that Territory a winding-up order was made upon a creditor's petition. The order superseded a voluntary liquidation which was in progress. It appointed an official liquidator, and required him to give security and to leave an account of his receipts and payments and to file a report of the progress of the winding up at the office of the District Registrar every three months. The Company had given a debenture purporting to create a floating charge over the assets of the Company, including the uncalled capital, and the winding-up order was expressed to be made without prejudice to the rights of the debenture-holder against the assets except that the petitioning creditor's costs should be paid in priority to the debenture.

The *Companies Ordinance* 1931 adopts, with modifications which it prescribes, the company legislation of New South Wales in force at the time it commenced, and it provides (sec. 19 (4)) that the practice and procedure so far as it is not regulated by rules of this Court shall be "as nearly as may be according to the practice and procedure of the Supreme Court of the State of New South Wales under the rules made in pursuance of . . . the *Companies Act* 1899 of that State." I interpret this as meaning the existing rules of the Supreme Court and not as referring to rules which might be made from time to time after the commencement of the Ordinance. It follows that, in my opinion, the *Companies Act Rules* of the Supreme Court of New South Wales made on 5th December 1932 do not apply.

The official liquidator has left at the office of the District Registrar accounts of receipts and payments up to the end of 1932. He now seeks to pass these accounts and also to have his remuneration fixed. He obtained appointments for these purposes with the District Registrar before whom the winding-up order directed that all subsequent proceedings should be taken. (See sec. 8 (h) of the *Companies Ordinance* 1931; sec. 85 (1) and (2) of *Companies Act* 1899 of New South Wales; r. 227 of the *Equity Rules*, and r. 88 of the *Companies Act Rules* 1889.) Although it does not appear that his claim against the Company had been already allowed by the Judge or the Registrar (see r. 57 of the *Companies Act Rules*) the debentureholder attended these appointments and objected that the liquidator's remuneration and certain disbursements contained in the accounts ought not to be allowed out of the assets in priority to his security. Thereupon the District Registrar referred both matters to the Court. It is said that the assets are insufficient to satisfy the liabilities secured by the debenture and that it is unlikely that any sum will be available for claims ranking after the debenture. The Court cannot overreach or postpone a security in exercising its statutory power "in the event of the assets being insufficient to satisfy the liabilities" to "make an order as to the payment out of the estate of the company being wound up of the costs, charges, and expenses incurred in winding up in such order or priority as the Court thinks just" (sec. 118). A security even over uncalled capital has prevailed

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over the claim of a petitioning creditor under an order for his costs (*In re Anglo-Austrian Printing and Publishing Union* ; *Brabourne v. Same* (1)). If a creditor whose debt is secured over the assets of the company come in and have his rights decided in the winding up, he is entitled to be paid principal and interest out of the fund produced by the assets encumbered by his debt after the deduction of the costs, charges and expenses incidental to the realization of such assets (*In re Marine Mansions Co.* (2)). The security is paramount to the general costs and expenses of the liquidation, but the expenses attendant upon the realization of the fund affected by the security must be borne by it (*In re Oriental Hotels Co.* ; *Perry v. Oriental Hotels Co.* (3)). The debenture-holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realized in the winding up, a proceeding to which they are thus parties, the proceeds must bear the cost of the realization just as if they had begun a suit for its realization or had themselves realized it without suit (cf. *In re Regent's Canal Ironworks Co.* ; *Ex parte Grissell* (4) ; and see *Batten v. Wedgwood Coal and Iron Co.* (5)).

In applying this principle, only those expenses appear to have been thrown against the fund belonging to the debenture-holders which have been reasonably incurred in the care, preservation and realization of the property. In the present case the liquidator has employed a material part of his time and energies in recovering moneys, both uncalled capital and debts, which enure for the debenture-holder, and in so far as these services increase the remuneration which he receives, I see no reason why the burden should not be thrown upon the proceeds. The question is not whether moneys available for unsecured creditors should be relieved at the expense of the security. In such a case it may be said that the service of collecting enough to discharge the debenture must in any event be performed in order that a surplus may then arise in which the unsecured creditors may participate. The question in the present case is whether the liquidator can charge against the fund passing

(1) (1895) 2 Ch. 891.

(2) (1867) L.R. 4 Eq. 601, at p. 611.

(3) (1871) L.R. 12 Eq. 126.

(4) (1875) 3 Ch. D. 411, per *James L.J.*, at p. 427.

(5) (1884) 28 Ch. D. 317, per *Pearson J.*, at p. 325.

through his hands as between himself and the person to whom it is payable, so much of the remuneration fixed for work done in the winding up as is referable to the calling in and conversion of the assets producing the fund. I see no reason why remuneration for work done for the exclusive purpose of raising the fund should not be charged upon it.

Counsel for the liquidator, after discussing upon the merits the question whether out of the receipts the remuneration and the disbursements objected to were allowable, proceeded to contend that I ought to fix the remuneration of the liquidator and pass the accounts without regard to the question whether these outgoings could be answered out of the receipts shown in the accounts in priority to the debenture debt. As the debenture-holder has, without objection, attended the taking of the account and the fixing of the remuneration, I think his claim to priority would be precluded if the accounts were passed in any form which involved the propriety of charging these outgoings upon the receipts. The accounts left at the office are not in the required form (cf. rr. 19 and 88 of *Companies Act Rules* and r. 252 of the *Equity Rules* (N.S.W.)). They do, in point of fact, purport to discharge the liquidator of receipts by throwing expenditure against them. Further, r. 18 of the *Companies Act Rules* (N.S.W.) authorizes the allowance of remuneration in the accounts of the official liquidator as well as its payment otherwise. I do not, therefore, propose to give effect entirely to the contention made on the part of the liquidator. But at the same time, as the validity of the debenture does not appear to have been undisputed and as large sums are said to be owing to the Company by persons who may not always remain as impecunious as they are said to be at present, I shall fix that remuneration and pass those items which would be payable out of assets not the subject of a valid security. I shall also decide what portion of the remuneration and which of those items of expenditure would take priority of the debenture-holder's debt notwithstanding that the debenture be valid and the assets be insufficient to meet it, but I shall do so without prejudice to any claim the liquidator may be able to establish in respect of the rest of his remuneration and disbursements.

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In fixing the remuneration I have considered the *Chancery Regulation* of 1868 set out in L.R. 3 Ch., at p. xliv., as explained in *In re Mysore Reefs Gold Mining Co.* (1) and in *In re Premier Permanent Building, Land, and Investment Association* (2) and the present English practice as it appears from *Palmer's Precedents*, 3rd ed., Part II., pp. 324-326 and 1244-1245, but while these suggest considerations to be taken into account, I think the actual rates of reward which they give should have little or no weight. Standards of remuneration for skilled services must depend upon local conditions, usages, and conceptions. The case is not one, in my opinion, in which the entire remuneration should be calculated upon a percentage. A lump sum should be fixed. For the services performed up to 31st December 1932, I fix a sum of two hundred and fifty guineas together with £16 3s. 2d. for travelling expenses. Of this total sum I think thirty guineas consists of remuneration for work done in reference to the realization or collection of the assets claimed by the debenture-holder and should therefore be given priority to the debenture.

Of the disbursements objected to on behalf of the debenture-holder, one only must, I think, be disallowed altogether. It is the amount of a premium paid by the liquidator to a guarantee company to obtain security as required by the winding-up order appointing him. As the liquidator is remunerated and undertakes the office as part of his professional work, the expense of finding the security which is a condition of the appointment must be borne by him, according to the principles stated in *Harris v. Sleep* (3), principles which are not, in my opinion, affected by *Blake v. Bayne* (4), nor by the considerations referred to in *In re Lucas*; *Parr v. Blair* (5). R. 15 (4) of the *Companies Act Rules* of 1932 (N.S.W.) now expressly prohibits the allowance of such a charge, but, as I have already said, these rules do not apply in the Federal Capital Territory.

The remaining outgoings objected to are all allowable independently of any question of priority, but the following must rank behind the debenture-holder's debt if the debenture be a good and available security over the assets:—Sept. 6, F. P. Woodward, solicitor,

(1) (1886) 34 Ch. D. 14.

(2) (1903) 25 A.L.T. 8.

(3) (1897) 2 Ch. 80, at pp. 82, 83.

(4) (1908) A.C. 371, at pp. 384, 385;

6 C.L.R. 179, at pp. 188, 189.

(5) (1900) 1 Ir. R. 292.

out-of-pocket expenses : £11 3s. 2d. Sept. 26, Witnesses' expenses : £3 1s. Oct. 31, Witnesses' expenses : 10s. Oct. 31, Witnesses' expenses : £1 1s.

I shall make no order as to the costs of this proceeding, but this does not mean that the liquidator may not charge his costs in his accounts, if and when there are assets available to answer them.

The order will be :—For his services up to 31st December 1932 let the official liquidator receive out of any assets, which are or may become lawfully available for the purpose, a remuneration of two hundred and fifty guineas and a further sum for travelling expenses of £16 3s. 2d., amounting in all to a sum of £278 13s. 2d. Subject to the following declaration and order, let the accounts up to 30th September and 31st December 1932 left in the office of the District Registrar at Canberra by the official liquidator, upon being properly vouched, be passed before the District Registrar except as to the item : “ 1932, Oct. 24, By Royal Insurance Co. liquidator's bond : £5 1s., ” which item is disallowed. Declare that as to the sum of thirty guineas part of the sum of the two hundred and fifty guineas aforesaid fixed as the official liquidator's remuneration and as to the disbursements appearing in the said accounts other than the following, namely—Sept. 6, F. P. Woodward, solicitor, out-of-pocket expenses, £11 3s. 2d.; Sept. 26, Witnesses' expenses, £3 1s.; Oct. 31, Witnesses' expenses, 10s.; Oct. 31, Witnesses' expenses, £1 1s.,—the official liquidator is entitled out of the assets which have or may come to his hands to deduct and retain the same in priority to the claim of the debenture-holder. Order that this order and the passing of such accounts shall be without prejudice to any claim of the official liquidator or his solicitor to rank otherwise in respect of remuneration, costs, charges, or expenses before the claim of the debenture-holder and, except as hereinbefore declared, to the claim of the debenture-holder upon or in reference to such assets. Remit the matter to the District Registrar to proceed with the passing of the accounts consistently with this order.

Order as above set out.

Solicitor for the official liquidator, *K. C. Codd.*

Solicitor for the debenture-holder, *C. W. Davies.*

H. D. W.